STATE OF MICHIGAN

COURT OF APPEALS

MARTIN I. LEVY and MARTIN I. LEVY, D.D.S., P.C.,

Plaintiff-Appellants,

v

MARK L. MARTIN, GERALD HOSKOW and HOSKOW & MARTIN, P.C.,

Defendant-Appellees.

UNPUBLISHED
September 17, 1999

No. 207797
Oakland Circuit Court
LC No. 97-549352 NM

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

WHITBECK, J. (*concurring in part and dissenting in part*).

I concur with my colleagues that the trial court should be affirmed in dismissing the count of plaintiffs' complaint alleging fraudulent misrepresentation. However, I respectfully dissent from their decision to affirm the trial court's grant of summary disposition in favor of defendants with regard to the count of the complaint alleging professional malpractice because, accepting the well-pleaded allegations of the complaint as true, that claim was not barred by the statute of limitations.

In the course of its discussion of the statute of limitations issue, the majority states:

> In this case, plaintiffs argue that defendants performed continuing bookkeeping services for them until some time in 1996, and that their claim did not accrue until that time. Defendants argued below that any bookkeeping services performed after the tax returns were filed were unrelated to the alleged malpractice . . . . Plaintiffs presented no documentary evidence to support their claim to the contrary. [Majority opinion, *supra* at 1-2.]

I understand this language as considering plaintiffs to have had some burden to produce documentary evidence in support of their claims. I further note that the record reflects that *neither* plaintiffs nor defendants offered any documentary evidence regarding the length of time that defendants provided professional services to plaintiffs.

With regard to their statute of limitations defense, defendants indicated in their brief in support of their motion to dismiss below that the motion was based on MCR 2.116(C)(7).[1] The trial court stated at the motion hearing that it was granting the motion to dismiss the professional malpractice claim based on the statute of limitations, thereby granting the motion as to this claim based on MCR 2.116(C)(7).

The following principles guide review of a trial court's decision under MCR 2.116(C)(7):

> As a defense, the statute of limitations is properly raised under MCR 2.116(C)(7). A motion under MCR 2.116(C)(7) may be supported by affidavits, admissions, or other documentary evidence and, if submitted, must be considered by the court. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). *We must take the well-pleaded allegations in the pleadings* and the factual support submitted by the nonmoving party *as true,* and summary disposition is proper only if the moving party is then shown to be entitled to judgment as a matter of law. [*Home Ins Co v Detroit Fire Extinguisher Co, Inc,* 212 Mich App 522, 527-528 (emphasis supplied).]

See also *Jackson Co Hog Producers v Consumers Power Co,* 234 Mich App 72, 77; 592 NW2d 112 (1999) ("When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true a plaintiff's *well-pleaded factual allegations*, affidavits, or other documentary evidence and construe them in the plaintiff's favor" [emphasis supplied].) Thus, I conclude that, if (1) a fact is specifically alleged in a complaint filed by a plaintiff and (2) no documentary evidence has been submitted by any party regarding that fact, then the fact must be accepted as true for purposes of a motion brought under MCR 2.116(C)(7).

In the case at hand, plaintiffs alleged in their complaint:

> 9. That Defendants, jointly and severally, were hired by Plaintiffs to act as their personal and corporate accountants.
>
> 10. That in this capacity, Defendants, jointly and severally, prepared and were responsible for the tax return forms of Plaintiffs through and including the returns for the years beginning in 1974 and 1996.

I do not believe it is proper to disregard these factual allegations because plaintiffs did not present documentary evidence in support of them. Rather, in the absence of the submission of any documentary evidence on these matters from any party, I conclude that this Court should, in accordance with *Home Ins Co, supra*, accept as true for purposes of reviewing whether plaintiffs' professional malpractice count was properly dismissed under MCR 2.116(C)(7) that defendants, acting as accountants, prepared and were responsible for plaintiffs' annual tax returns from 1974 to 1996.

As referenced by the majority, under MCL 600.5838(1); MSA 27A.5838(1) [§ 5838(1)], the statutory "last treatment" rule, except with regard to a medical malpractice claim, "a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed

profession accrues at the time that person discontinues serving the plaintiff in a professional or psuedo-professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim."

Prior to an amendment effective October 1, 1986, § 5838(1) applied to all claims of professional malpractice, including claims of medical malpractice. See *Morgan v Taylor*, 434 Mich 180, 185-186, n 12; 451 NW2d 852 (1990). In *Morgan*, the Michigan Supreme Court addressed application of the pre-amendment version of § 5838(1) to a case involving alleged malpractice by an optometrist in examining a patient's eyes.[2] The principal plaintiff in *Morgan* went to the defendant optical company in that case for eye examinations in 1976, 1978, 1981 and 1983. *Morgan, supra* at 182. The plaintiff alleged that the optometrist who examined him in 1981 negligently failed to diagnose the plaintiff's glaucoma and to take appropriate steps to refer the plaintiff for treatment. *Id.* at 183. The basic issue in *Morgan* was whether the claim accrued within the meaning of § 5838(1), e.g. the statute of limitations began to run, at the time of the 1981 examination when the alleged negligence occurred (in which case the plaintiff's claim would have been barred) or at the time of the last examination in 1983 (with the result that the statute of limitations would not have barred the plaintiff's claim).

The *Morgan* Court in its unanimous opinion concluded that the possible claim in that case did not accrue until the 1983 examination. *Morgan, supra* at 194. The Court discussed the basic rationale underlying the last treatment rule of § 5838(1):

> The rationale for the last treatment rule has been explained on grounds that the patient, while the treatment continues, "relies completely on his physician and is under no duty to inquire into the effectiveness of the latter's measures." Lillich, *The malpractice statute of limitations in New York and other jurisdictions*, 47 Cornell L Q 339, 361 (1962) (citing *De Haan v Winter*[, 258 Mich 293; 241 NW 923 (1932)]).
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> As the Court of Appeals stated in *Heisler v Rogers*, 113 Mich App 630, 633; 318 NW2d 503 (1982):
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> The essence of the last treatment rule is that the cessation of the ongoing patient-physician relationship marks the point where the statute of limitations begins to run. [*Morgan, supra* at 187-188.]

Notably in the circumstances of this case, the *Morgan* Court pointedly rejected an argument that the last treatment rule did not apply to routine, periodic examinations:

> In the instant case defendant argues that the rationale underlying the last treatment rule does not apply in the context of routine, periodic examinations. It is contended that there is no air of truthfulness and trust once the examination is concluded. We disagree. It is the doctor's assurance upon completion of the periodic

examination that the patient is in good health which induces the patient to take no further action other than scheduling the next periodic examination.

I consider a faithful application of the legal principles enunciated in *Morgan* to control the issue at hand. A health professional and patient on the one hand are similarly situated in this regard to an accountant who provides annual income tax preparation services and the accountant's client. As, under the rationale of the last treatment rule, a patient was (before the amendment of § 5838(1) making it inapplicable to medical malpractice claims) entitled to rely "completely" on the health professional and not inquire into the effectiveness of the health professional's measures prior to the termination of the relationship, an accountant's client is likewise entitled to rely "completely" on the account's skills and effectiveness until the termination of the relationship. A patient who attended a periodic examination and was not diagnosed with any medical problem was under the rationale of the last treatment rule provided with an "assurance" of good health that induced the patient to take no further action to investigate the pertinent health matters until the next periodic examination. Likewise, a client who entrusts preparation of annual tax returns to an accountant is provided with an assurance of professional preparation of the tax returns that induces the client to take no further action regarding those matters until it is time to prepare the next year's tax returns. As discussed above, accepting the well-pleaded allegations of the complaint as true, *Home Ins Co*, *supra*, defendants prepared annual tax returns for plaintiffs from 1974 until 1996 – encompassing the times of the alleged professional negligence in preparing the 1991 and 1992 tax returns. Thus, I conclude that, based on the well-pleaded allegations of plaintiffs' complaint, under the last treatment rule of § 5838(1) as explained in *Morgan*, plaintiffs' possible claim did not accrue – meaning the statute of limitations did not begin to run – until at least 1996. The complaint in this case was filed in 1997 and thus was plainly within the applicable limitations period, which was two years as noted by the majority. Thus, in my view, the trial court erred by granting summary disposition in favor of defendants under MCR 2.116(C)(7) based on the statute of limitations.

I respectfully disagree with the majority's attempt to distinguish the "continuing care of one patient's set of eyes in *Morgan*, *supra*," from what the majority describes as "the series of unrelated tax calculations in this case." Majority opinion, *supra* at 2. The touchstone of the analysis in *Morgan* was *the continuing professional relationship* between a professional and the person receiving the professional's services with regard to a particular subject matter, not any direct connection between the work performed by the professional at continuing periodic sessions during that relationship. The alleged negligence in *Morgan* occurred during a glaucoma test on the principal plaintiff in *Morgan* at a 1981 eye examination. *Morgan*, *supra* at 182-183. The principal plaintiff in *Morgan* did not return to the defendant optical company for an examination until 1983 for his next routine eye examination. *Id.* at 182. There is no indication in *Morgan* that the manner in which the eye examination was conducted in 1983 had any direct connection to the performance of the 1981 glaucoma test. Nevertheless, the *Morgan* Court concluded that, due to the statutory "last treatment" rule, the statute of limitations with regard to alleged negligence in the 1981 glaucoma test did not begin to run on the date it was performed because of the continuing professional relationship between the patient and the optical company.

Similarly, in this case, plaintiffs' complaint alleges, without any contrary documentary evidence in the record, the existence of a continuing relationship of tax preparer and client that did not end until

1996. Until the end of that relationship, for purposes of applying the "last treatment" rule and thereby ascertaining whether the statute of limitations bars this suit, plaintiffs had "no duty to inquire into the effectiveness of [defendants'] measures" until the end of the professional relationship. *Id.* at 188 (citation omitted).[3]

I note that it may (or may not) be wise for MCL 600.5838(1); MSA 27A.5838(1) to be amended to completely abolish the "last treatment" rule. However, "[t]he wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which the courts may not interfere." *Morgan, supra* at 192, quoting *Melia v Employment Security Comm,* 346 Mich 544, 561; 78 NW2d 273 (1956). Our duty is to faithfully apply the legislatively adopted policy of the "last treatment" rule to claims of professional malpractice, other than medical malpractice, not to attempt to limit that policy by an unduly narrow application.

In sum, I concur with the majority that the trial court should be affirmed in dismissing the fraudulent misrepresentation count of plaintiffs' complaint. However, the trial court's dismissal of the professional malpractice count of the complaint should be reversed and this case should be remanded for further appropriate proceedings with regard to that count.

/s/ William C. Whitbeck

[1] Defendants literally stated, "This Motion is based upon MCR 2.116(B)(7) on the basis of the statute of limitations …." Inasmuch as there is no subpart (7) to MCR 2.116(B), it is apparent that defendants were actually referring to MCR 2.116(C)(7), which provides as a ground for moving for summary disposition that "[t]he claim is barred because of … statute of limitations …."

[2] Because there are no substantive differences between the version of § 5838(1) in force immediately preceding the 1986 amendment and the current version except the exclusion of medical malpractice claims from this statutory provision, the legal conclusions in *Morgan* are instructive and, in appropriate circumstances, controlling with regard to claims of professional malpractice other than medical malpractice under the current version of the statute.

[3] However, I further question the majority's apparent view of the preparation of each year's tax returns as inherently involving a completely separate transaction on the basis of "common sense." Depending on its complexity and the tax situation of the taxpayer, a given tax return may (or may not) reflect "the examination of a discrete, contained body of information." I think it is fairly well recognized, for example, that, especially with regard to business income taxation, certain matters such as depreciation of business assets and eligibility for certain tax credits often depend on facts that extend further into the past than the prior tax year. Thus, from the current state of the record, it is not clear that each instance of preparation of annual income tax returns by defendants involved calculations and judgments that lacked any direct connection to their preparation of income tax returns in prior years.